

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Implementation of Section 703)
of the Telecommunications Act)
of 1996)
) CS Docket No. 96-166
Amendments and Additions to the)
Commission's Rules Governing Pole)
Attachments)

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1997

Released: May 22, 1997

By the Commission:

I. INTRODUCTION

1. In this proceeding, we address a Request for Clarification and Reconsideration ("Request") of the Commission's Order *In the Matter of Implementation of Section 703 of the Telecommunications Act of 1996, Amendments and Additions to Commission's Rules Governing Pole Attachments ("Self-Effectuating Order")*¹ filed by Delmarva Power and Light ("Delmarva") on September 19, 1996. In its Request, Delmarva contends that the Commission deprived utilities of the opportunity to address concerns related to the impact of the rules promulgated in the *Self-Effectuating Order*. Delmarva seeks reconsideration and clarification of Sections 1.1402(a)² and 1.1416(b)³ of the Commission's rules. We think the issues raised in Delmarva's Request are best resolved in the pending proceeding addressing access to rights-of-way by telecommunications service providers. We do clarify the text of Section of 1.1416(b).

¹ 11 FCC Rcd 9541 (1996).

² 47 C.F.R. § 1.1402(a).

³ 47 C.F.R. § 1.1416(b).

II. BACKGROUND

2. The Telecommunications Act of 1996 ("1996 Act")⁴ amended Section 224 in a number of respects. Most prominently, it created a right of access for telecommunications carriers. New Sections 224 (d)(3), (e), (f), (g), (h) and (i) prescribed expanded access and established a new methodology for determining just and reasonable rates for telecommunications carriers.⁵ The 1996 Act also amended the definitions of "utility" and "pole attachment" in Sections 224(a)(1) and (a)(4); recognized a State's authority to regulate pole attachments involving telecommunications carriers in Sections 224 (c)(1) and (c)(2)(B); and added Section 224(a)(5) to exempt incumbent local exchange carriers ("LECs") from the definition of telecommunications carriers.⁶ The Commission adopted rules relating to the access provisions of the 1996 Act, Sections 224(c)(1), (f) and (h) in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order* ("Local Competition Provisions").⁷

3. The *Self-Effectuating Order* amended the Commission's pole attachment rules to reflect the self-effectuating provisions of Sections 224(a)(1), (a)(4) and (c)(2)(B), and new Sections 224(a)(5), (d)(3), (g), and (i) pursuant to Section 703 of the 1996 Act.⁸ As we stated, "[W]e are revising these rules without providing prior public notice and an opportunity for comment because the rule modifications do not involve discretionary action on the part of the Commission but rather, simply conform our rules to the applicable provisions of the 1996 Act."⁹ The Commission found that notice and comment procedures were unnecessary, and that its actions fell within the "good cause" exception of the Administrative Procedure Act.¹⁰

⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 104 Stat. 56, 149-151, signed February 8, 1996 (to be codified at 47 U.S.C. § 224).

⁵ 47 U.S.C. § 224. In order to implement the new telecommunications service providers formula, Congress directed the Commission to issue new pole attachment formulas within two years of the effective date of the 1996 Act. We will propose these new rules and seek comment in a subsequent Notice.

⁶ 47 U.S.C. § 224(a)(5).

⁷ 11 FCC Rcd. 15499, par. 1119-1248 (August 8, 1996).

⁸ 47 U.S.C. § 224 as amended by the 1996 Act, § 703.

⁹ *Self-Effectuating Order*, 11 FCC Rcd at 9542.

¹⁰ See Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B). The Administrative Procedure Act allows an agency to promulgate rules without Notice and Comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* In its Request, Delmarva only alludes to Section 553 of the Administrative Procedure Act, but does not argue that the Commission violated Section 553. Request at 1.

that Section 224(a) required no further interpretation and the Commission correctly adopted the statutory language into its rules.¹⁹ According to ALTS, Delmarva is seeking to have the Commission rewrite the statute.²⁰ ALTS believes that Congress was aware of the potential for utilities to favor their own telecommunications service providers and provided competing carriers access to utility poles, ducts, conduits and rights-of-way.²¹ ALTS asks the Commission to deny Delmarva's Request because it is seeking to restrict access to its utility poles, ducts and rights-of-way, which is clearly inconsistent with the 1996 Act.²²

D. Delmarva's Reply

7. In its Reply comments, Delmarva states that contrary to ALTS' assertion, it is not requesting the Commission to rewrite the statute.²³ Delmarva merely seeks clarification as to when, if ever, a utility must develop infrastructure on bare rights-of-way.²⁴ According to Delmarva, a utility should not be required to create new infrastructure for the benefit of cable operators and telecommunications service providers.²⁵

IV. DISCUSSION

8. We do not think that the *Self-Effectuating Order* is the proper proceeding to consider Delmarva's request to interpret or reconsider Sections 1.1402(a) or 1.1416(b) of the Commission's rules. Accordingly, we deny these requests for clarification as being beyond the scope of this proceeding. Rather, we think that Delmarva's Request relating to Sections 1.1402(a) and 1.1416(b) is more appropriately addressed in the *Local Competition Provisions* proceeding. We will, therefore, consider Delmarva's Request as a comment in the *Local Competition Provisions* reconsideration proceeding.²⁶

¹⁹ Opposition at 2-3. The definition of utility contained in Section 224(a) is identical to the Commission's rule, 47 C.F.R. § 1.1402(a).

²⁰ Opposition at 2-3.

²¹ Opposition at 3.

²² *Id.*

²³ Reply at 2.

²⁴ *Id.*

²⁵ *Id.*

²⁶ In the *Local Competition Provisions* reconsideration, Delmarva did address Section 1.1402(a), but did not address Section 1.1416(b) of the Commission's rules. The issue of who must pay for the rearrangement, modification or replacement of poles is addressed, however, in paragraphs 1211-1216 of the *Local Competition Provisions* Order as well as Section 1.1416(b) of our rules, which was modified by that Order. See also *Local Competition Provisions* at paras. 1162-1163 (discussing obligations with respect to rights-of-way). The issues raised by Delmarva involving

III. PLEADINGS

A. Delmarva's Request

4. In noting that the definition of utility allows a cable operator or a telecommunications service provider to access a utility's right-of-way, even if the right-of-way is undeveloped,¹¹ Delmarva seeks clarification as to whether it was Congress' or the Commission's intent to require a utility to develop infrastructure on bare rights-of-way for the benefit of cable operators and telecommunications service providers.¹² Delmarva also seeks clarification on when an attaching entity must pay its own costs associated with the rearrangement, modification or replacement of the pole under Section 1.1416(b).¹³ In addition, Delmarva states that there are two different versions of Section 1.1416(b): one found in the *Self-Effectuating Order* and another found in the *Local Competition Provisions* proceeding. Delmarva seeks clarification as to the correct version of the Commission's rules.¹⁴

B. Supporting Comments of The Edison Electric Institute and UTC, and U S West

5. On October 21, 1996, The Edison Electric Institute and UTC filed joint comments in support of Delmarva's Request ("EEI/UTC Comments"). EEI/UTC also seek reconsideration and clarification of Sections 1.1402(a) and 1.1416(b) of the Commission's rules.¹⁵ In its supporting comments, EEI/UTC raise the same arguments made by Delmarva in its Request.¹⁶ U S West, Inc. ("U S West") also filed comments in support of Delmarva's Request for clarification of Section 1.1416(b).¹⁷

C. The Association for Local Telecommunications Services' Opposition

6. The Association for Local Telecommunications Services ("ALTS") filed an Opposition ("Opposition") to Delmarva's Request. ALTS asserts that the Commission was correct when it implemented Section 224(a) without prior public notice.¹⁸ ALTS contends that it is clear

¹¹ Request at 2.

¹² Request at 2-3.

¹³ Request at 3.

¹⁴ *Id.*

¹⁵ EEI/UTC Comments at 2-4.

¹⁶ *Id.*

¹⁷ Supporting Comments of U S West at 2.

¹⁸ Opposition at 2.

9. With regard to Delmarva's request to clarify what version of Section 1.1416(b) is in effect, a new Section 1.1416(b) was adopted in the *Self-Effectuating Order*²⁷ on August 6, 1996, and then amended in the *Local Competition Provisions* proceeding. A revised rule that appears later in time supersedes an earlier version of that rule.²⁸ The correct version of Section 1.1416(b), as reflected in the *Local Competition Provisions* proceeding reads as follows.²⁹

The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

Section 1.1416(b) will be considered with the other petitions for reconsideration which have raised similar issues involving Section 1.1416(b) in the *Local Competition Provisions* proceeding.

²⁷ Section 1.1416(b) as it appears in the *Self-Effectuating Order*.

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

²⁸ See *Redhouse v. C.I.R.*, 728 F.2d 1249, 1253 (9th Cir. 1984) (stating the proposition that it is a well-settled principle of statutory construction that the specific prevails over the general, and the provision which is later enacted prevails over the earlier enacted).

²⁹ Because this Order makes no changes in our rules, we conclude that a Regulatory Flexibility Act analysis is unnecessary.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the Delmarva Power and Light Request for Clarification and Reconsideration in CS Docket No. 96-166 IS GRANTED to the extent indicated herein, and IS DENIED in all other respects.

11. IT IS FURTHER ORDERED that the Delmarva Power and Light Request for Clarification and Reconsideration, as it relates to Sections 1.1402(a) and 1.1416(b) of the Commission's rules, shall be treated as comments *In Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98.

12. IT IS FURTHER ORDERED that pursuant to Section 703 of the Telecommunications Act of 1996, (Section 224 of the Communications Act of 1934, as amended, 47 U.S.C. § 224), and to Sections 4(i) and 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. §§ 154(i), 303(r) Subpart J of Part 1 of the Commission's Rules, that the clarification of Section 1.1416(b) discussed in this Order IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton
Acting Secretary